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No. 79-291

In the Supreme Court of the United States

OCTOBER TERM, 1979

JAMES THOMAS GRISSOM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 21-22) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1979. A petition for rehearing was denied on July 23, 1979 (Pet. App. 23-24). The petition for a writ of certiorari was filed on August 22, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court committed plain error by permitting a narcotics agent to testify as to his opinion about the meaning of certain figures written on the back of petitioner's business card.

2. Whether an error in the citation of a statute in the indictment requires that petitioner's conviction be reversed.

3. Whether the court should have ordered the government to provide petitioner with a list of its witnesses and should have ordered the government's chief witness to submit to an interview by defense counsel.

4. Whether the court committed reversible error in denying a motion to sever the two counts of the indictment.

5. Whether the court abused its discretion in sentencing petitioner.

STATEMENT

Following a jury trial in the United States District Count for the Eastern District of Tennessee, petitioner was convicted of distributing cocaine and aiding and abetting its distribution, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.[1] He was sentenced to seven years' imprisonment, to be followed by a three-year special parole term.

1. The evidence at trial showed that on December 2, 1977, Jerry Owensby, an undercover DEA agent, met with petitioner at petitioner's place of business in Knoxville, Tennessee (Tr. 8-11). Owensby told petitioner that he was interested in purchasing an ounce of cocaine that day and that, if the quality of the cocaine were good, he would return within a week or 10 days for a larger amount. Petitioner replied that there would be no

[1]The indictment charged three others as defendants along with petitioner (C.A. App. 5A), but only one of those charged was tried with petitioner. The charges against that co-defendant were dismissed at trial on the government's motion (Tr. 112-113).

problem in supplying large amounts of cocaine, since he received up to three shipments of cocaine per week (Tr. 11). Petitioner then told Agent Owensby to go to petitioner's apartment and to wait there (Tr. 12). Later that day, after a telephone conversation with petitioner, Agent Owensby went to James Hutchinson's[2] apartment in the same building, where five grams of cocaine were delivered to him by Hutchinson in exchange for $400 (Tr. 13-15).

On December 14, 1977, Agent Owensby met with petitioner at the latter's apartment. Petitioner asked Owensby, "[h]ow many do you want," which Owensby interpreted to refer to ounces of cocaine. Owensby replied, "[w]ell, if the price is right I will have one." Petitioner said that the price was $2100, and Owensby agreed to buy one ounce (Tr. 17-18). The two then drove to another apartment complex, where they met Hutchinson who gave Owensby a bag containing approximately 29 grams of cocaine (Tr. 19-21). Owensby then told petitioner and Hutchinson that, if the cocaine were of good quality, he would like to purchase larger amounts in the future and asked what the prices would be (Tr. 21). Petitioner then removed a business card from his wallet and wrote some figures on the card. Similarly, Hutchinson wrote some figures on a different card (Tr. 21). Owensby testified that the figures referred to the prices for various quantities of cocaine (Tr. 22-23). Owensby then paid petitioner $2100 for the cocaine (Tr. 24).

The jury found petitioner not guilty on count 1 (the December 2 sale) and guilty on count 2 (the December 14 sale).

[2]Hutchinson was charged in the same indictment as petitioner but pled guilty before trial and testified for the government (Tr. 78).

The court of appeals affirmed by judgment order (Pet. App. 21-22). It held that the district court had not abused its discretion in refusing to order the government to turn over a list of its witnesses in advance of trial and in declining to grant a severance of the two counts. The court also held that the sentence imposed on petitioner was well within the statutory maximum and could not be deemed an abuse of discretion.

ARGUMENT

1. Petitioner contends (Pet. 5-7) that the district court committed plain error by allowing Agent Owensby to testify about the meaning of the figures petitioner wrote on the back of a business card in response to Owensby's question about the price of larger quantities of cocaine.

This point was not raised in the court of appeals, and it should not be considered here for the first time. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, the contention is without merit. Because petitioner wrote the figures in Owensby's presence and in response to Owensby's question about the prices that petitioner would charge for different amounts of cocaine (see Tr. 21), it was entirely proper for Owensby to testify that he understood the figures to be a price list for varying quantities of cocaine. This was not an expert opinion; it was simply an opinion or inference that was "rationally based on the perception of the witness." Fed. R. Evid. 701. It was therefore within the discretion of the court to admit Owensby's testimony. See *United States* v. *Mandujano*, 499 F. 2d 370 (5th Cir. 1974), cert. denied, 419 U.S. 1114 (1975).

Moreover, as petitioner concedes (Pet. 6), no objection was made to the question at trial. Even assuming that the testimony should not have been admitted, its admission is

clearly not a "plain error" that seriously affects "substantial rights" of the accused. See Fed. R. Crim. P. 52(b). In light of Owensby's first-hand account of the cocaine transaction, the testimony as to the figures could have had little effect on the verdict. Admission of that testimony is certainly not a ground for reversal in the absence of an objection at trial.[3]

2. Petitioner next argues (Pet. 7-10) that the indictment must be dismissed because it miscited the narcotics distribution statute. The indictment charged that petitioner violated "18 U.S.C. 841(a)(1)," while it should have been charged that he violated "21 U.S.C. 841(a)(1)." This point also was not raised in the district court or in the court of appeals and therefore should not be considered here. In any event, it is frivolous.

Petitioner makes no claim that he was misled by the technical citation error, nor could he. He was properly advised as to the nature of the charges against him. The indictment alleged each of the elements of the offense of unlawful distribution of a controlled substance that is prohibited by 21 U.S.C. 841(a)(1). In addition, the indictment identified the substance, the amount distributed on both occasions, the names of the persons involved in the distributions, and the precise dates that the two distributions occurred (C.A. App. 5A). Rule 7(c)(3) of the Federal Rules of Criminal Procedure specifically provides that an error in the citation of a statute "shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to

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[3]Petitioner's reliance (Pet. 6-7) on *Kotteakos* v. *United States*, 328 U.S. 750 (1946), is misplaced. *Kotteakos* discusses the standard for harmless error (see Fed. R. Crim. P. 52(a)), not the standard for plain error that is applicable when no objection has been made at trial.

his prejudice." See *Steinert* v. *U.S. District Court*, 543 F.2d 69 (9th Cir. 1976); *United States* v. *Garner*, 529 F.2d 962, 966 (6th Cir.), cert. denied, 426 U.S. 922 (1976).

3. Petitioner next contends (Pet. 10-13) that the district court erred when it declined to provide him with a list of witnesses prior to trial, and when it refused to order Agent Owensby to submit to an interview by defense counsel.

It is firmly established that a defendant is not entitled to a list of the government's witnesses except in a capital case. Cf. 18 U.S.C. 3432. See *United States* v. *Little*, 562 F.2d 578, 581 (8th Cir. 1977); *United States* v. *Mitchell*, 540 F.2d 1163 (3d Cir. 1976), cert. denied, 429 U.S. 1099 (1977); *United States* v. *Jordan*, 399 F.2d 610, 615 (2d Cir.), cert. denied, 393 U.S. 1005 (1968).

Nor is there any authority for petitioner's proposition that the court erred by refusing to order Agent Owensby to submit to an interview with defense counsel. In *Gregory* v. *United States*, 369 F.2d 185 (D.C. Cir. 1966), relied upon by petitioner, the court disapproved the prosecutor's instructions to government witnesses that they should not talk with defense counsel unless the prosecutor was present. But the courts have uniformly held that if a witness does not wish to submit to an interview with one side or another, his wishes must be respected. See *United States* v. *Matlock*, 491 F.2d 504, 506 (6th Cir.), cert. denied, 419 U.S. 864 (1974); *United States* v. *White*, 454 F.2d 435, 438-439 (7th Cir. 1971), cert. denied, 406 U.S. 962 (1972); *United States* v. *Dryden*, 423 F.2d 1175, 1177 (5th Cir.), cert. denied, 398 U.S. 950 (1970); *Byrnes* v. *United States*, 327 F.2d 825, 832-833 (9th Cir.), cert. denied, 377 U.S. 970 (1964). And it has been expressly held that it is not error for the court

to decline to order a witness to talk to defense counsel. See *United States* v. *Rice*, 550 F.2d 1364, 1374 (5th Cir. 1977); *United States* v. *Mirenda*, 443 F.2d 1351, 1356 (9th Cir.), cert. denied, 404 U.S. 966 (1971).

4. Petitioner further contends (Pet. 13-17) that the two counts should have been severed for trial. This claim is without merit. The two charges were closely related, as was demonstrated by the government's evidence at trial.[4] Both counts were "of the same or similar character" and also were based on two "transactions connected together." Fed. R. Crim. P. 8(a). Accordingly, joinder of the two offenses was indisputably proper. See, *e.g.*, *United States* v. *Sanders*, 463 F.2d 1086 (8th Cir. 1972); *United States* v. *Kellerman*, 432 F.2d 371, 374 (10th Cir. 1970).

Petitioner has not established that he was prejudiced by the failure to grant a severance. He contends that the joinder made his defense more difficult because it forced him to take the stand and to adopt somewhat inconsistent defenses with respect to the two charges.[5] However, the fact that the joinder may have made petitioner's defense more difficult does not mean that it did so unfairly. Putting a defendant in a position that makes it awkward

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[4]Agent Owensby purchased the first portion of cocaine as a sample; he and the defendants understood that that sale would lead to further sales in the future. In fact, Owensby specifically indicated that, if the sample were satisfactory, he would return for a larger amount within approximately a week to 10 days (Tr. 11). Twelve days after the first sale, Owensby returned and made the second purchase. That purchase was a direct result of the first purchase.

[5]Petitioner also notes (Pet. 17) that the joinder permitted the jury to hear evidence of two crimes. This factor, of course, is present in any case where two offenses are joined, and it cannot require a severance.

for him to adopt inconsistent defenses is hardly unfair.[6] Similarly, just because the joinder of charges may have reduced the tactical advantage to petitioner of remaining silent at trial does not mean that the joinder violated his Fifth Amendment right against compulsory self-incrimination.[7] A decision whether to grant a severance is committed to the discretion of the trial court, and the denial here was a proper exercise of that discretion. See *Opper* v. *United States*, 348 U.S. 84, 95 (1954).

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[6]In any event, petitioner's defenses to the two charges were not necessarily inconsistent. His defense to the first count was that he was not present at and did not participate in the sale; his defense to the second count was that he was present during, but did not participate in, the sale (Pet. 16). With respect to both sales, he suggested that it was Hutchinson who was the guilty party.

[7]Petitioner relies on *Cross* v. *United States*, 335 F.2d 987 (D.C. Cir. 1964), in support of his claim that he should have been granted a severance because he wished to testify as to count one but not as to count two. *Cross*, however, was expressly limited in *Baker* v. *United States*, 401 F.2d 958, 976-977 (D.C. Cir. 1968), cert. denied, 400 U.S. 965 (1970). There, the court held that "no need for a severance exists until the defendant makes a convincing showing that he has both important testimony to give concerning one count and strong need to refrain from testifying on the other." *Id.* at 977 (footnote omitted). Only if the defendant makes such a showing can the court properly "weigh the considerations of 'economy and expedition in judicial administration' against the defendant's interest in having a free choice with respect to testifying." *Ibid.* (footnote omitted). Other courts of appeals have similarly rejected the broad implications of *Cross*. See *United States* v. *Jamar*, 561 F. 2d 1103, 1108 n.9 (4th Cir. 1977); *United States* v. *Jardan*, 552 F. 2d 216, 220 (8th Cir.), cert. denied, 433 U.S. 912 (1977); *United States* v. *Weber*, 437 F.2d 327, 334-335 (3d Cir. 1970), cert. denied, 402 U.S. 932 (1971). In this case, petitioner failed to make any such showing. In his motion for a severance (see C.A. App. 17A), he alleged only that there appeared to be "a very real possibility" that he would want to testify as to count one but not as to count two. He failed to indicate what "important testimony" he could give with respect to count one or why he had a "strong need" to refrain from testifying as to count two. Accordingly, the district court properly denied petitioner's motion for a severance.

5. Finally, petitioner argues (Pet. 17-19) that he was given an unduly harsh sentence compared to Hutchinson, who pleaded guilty and received only a three-year sentence, all but six months of which was suspended.

The terms of Hutchinson's sentence were set under a plea agreement that was approved by the court. Because of Hutchinson's psychiatric problems, he was placed on probation following service of a six-month jail term, on the condition that he commit himself to a psychiatric hospital or make arrangements for continued psychiatric care (see Tr. 102-105). By accepting the terms of the plea bargain, including the agreed-upon sentence for Hutchinson, the court did not in any way bind itself with respect to the sentence that it could properly give petitioner.

As petitioner's counsel conceded at the sentencing hearing (Tr. 148), petitioner had two prior federal convictions for which he had served a term of imprisonment, and he had been prosecuted and fined on criminal charges in Canada. In light of petitioner's prior record and the evidence that he was involved in a major drug distribution operation, his sentence, which was less than half the statutory maximum, was clearly within the district court's discretion to impose. See *Dorszynski* v. *United States*, 418 U.S. 424, 431 (1974).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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